

UNITED STATES DISTRICT COURT  
WESTERN DISTRICT OF WASHINGTON  
AT SEATTLE

ROBERT S. HILLIARD,	)	CASE NO. C12-6022-JLR-MAT
	)	
Plaintiff,	)	
	)	
v.	)	REPORT AND RECOMMENDATION
	)	RE: SOCIAL SECURITY DISABILITY
CAROLYN W. COLVIN, Acting	)	APPEAL
Commissioner of Social Security, <sup>1</sup>	)	
	)	
Defendant.	)	

Plaintiff Robert S. Hilliard proceeds through counsel in his appeal of a final decision of the Commissioner of the Social Security Administration (Commissioner). The Commissioner denied plaintiff's application for Disability Insurance Benefits (DIB) after a hearing before an Administrative Law Judge (ALJ). Having considered the ALJ's decision, the administrative record (AR), and all memoranda of record, the Court recommends this matter be REMANDED for further administrative proceedings.

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<sup>1</sup> Carolyn W. Colvin, Acting Commissioner of Social Security, is substituted as defendant in this suit. Fed. R. Civ. P. 25(d)(1).

## **FACTS AND PROCEDURAL HISTORY**

Plaintiff was born on XXXX, 1958.<sup>2</sup> He graduated from high school and previously worked as a laborer and trim stencil maker.

Plaintiff filed an application for DIB in April 2009, alleging disability beginning July 2, 2006. (AR 123-24.) His application was denied initially and on reconsideration, and he timely requested a hearing.

ALJ M.J. Adams held a hearing on January 31, 2011, taking testimony from plaintiff, a vocational expert, and plaintiff's sister, Suzanne Firth. (AR 36-63.) At hearing, plaintiff amended his alleged onset date to December 31, 2007. (AR 50.) On February 17, 2011, the ALJ rendered a decision finding plaintiff not disabled. (AR 20-31.)

Plaintiff timely appealed. The Appeals Council granted plaintiff's request for review. (See AR 4.) In a decision dated September 27, 2012, the Appeals Council made one new finding, affirmed the ALJ's remaining findings, and concluded plaintiff was not disabled. (AR 4-7.) By granting review, the Appeals Council issued the Commissioner's final decision. 20 C.F.R. §§ 404.505, 404.981. *Accord Brewes v. Comm'r of SSA*, 682 F.3d 1157, 1162 (9th Cir. 2012). Plaintiff appealed this final decision of the Commissioner to this Court.

## **JURISDICTION**

The Court has jurisdiction to review the ALJ's decision pursuant to 42 U.S.C. § 405(g).

## **DISCUSSION**

The Commissioner follows a five-step sequential evaluation process for determining

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<sup>2</sup> Plaintiff's date of birth is redacted back to the year of birth in accordance with Federal Rule of Civil Procedure 5.2(a) and the General Order of the Court regarding Public Access to Electronic Case Files, pursuant to the official policy on privacy adopted by the Judicial Conference of the United States.

01 whether a claimant is disabled. *See* 20 C.F.R. §§ 404.1520, 416.920 (2000). At step one, it  
02 must be determined whether the claimant is gainfully employed. The ALJ found that  
03 plaintiff's work since the amended onset date, including his current part-time work, did not  
04 constitute substantial gainful activity (SGA).

05 At step two, it must be determined whether a claimant suffers from a severe impairment.  
06 The ALJ found plaintiff's features of pervasive developmental disorder, social anxiety  
07 disorder, and features of schizoid and avoidant personality disorder severe. Step three asks  
08 whether a claimant's impairments meet or equal a listed impairment. The ALJ found  
09 plaintiff's impairments did not meet or equal the criteria of a listed impairment.

10 If a claimant's impairments do not meet or equal a listing, the Commissioner must  
11 assess residual functional capacity (RFC) and determine at step four whether the claimant has  
12 demonstrated an inability to perform past relevant work. The ALJ found plaintiff had the RFC  
13 to perform a full range of work at all exertional levels and the mental capability to adequately  
14 perform the mental activities generally required by competitive, remunerative work as follows:  
15 plaintiff can understand, remember, and carry out simple, one-to-two step and detailed and  
16 complex instructions required of jobs classified at a specific vocational preparation ("SVP")  
17 level of one or two or unskilled work, and also some jobs at the SVP 3 and 4 and semi-skilled  
18 level of work; plaintiff has the average ability to perform sustained work activities (i.e., can  
19 maintain attention and concentration, persistence, and pace) in an ordinary work setting on a  
20 regular and continuing basis (i.e., eight hours a day for five days a week or an equivalent work  
21 schedule) within customary tolerances of employers' rules regarding sick leave and absence;  
22 plaintiff can make judgments on simple and detailed or complex work-related decisions

01 required of jobs up to the semi-skilled level and can respond appropriately to a familiar  
02 supervisor, but should not be required to interact with co-workers to accomplish the work;  
03 plaintiff can deal with changes all within a stable work environment not dealing with the  
04 general public, as in a sales position or where the general public is frequently encountered as an  
05 essential element of the work process; and incidental contact with the general public is not  
06 precluded. With that RFC, the ALJ found plaintiff able to perform his past relevant work as a  
07 laborer as actually and generally performed.

08 If a claimant demonstrates an inability to perform past relevant work or has no past  
09 relevant work, the burden shifts to the Commissioner to demonstrate at step five that the  
10 claimant retains the capacity to make an adjustment to work that exists in significant levels in  
11 the national economy. Finding plaintiff not disabled at step four, the ALJ did not proceed to  
12 step five. The ALJ concluded plaintiff was not under a disability from December 31, 2007  
13 through the date of the decision.

14 The Appeals Council also rendered a decision finding plaintiff not disabled. The  
15 Appeals Council affirmed the ALJ's findings at steps one through three. The Appeals Council  
16 disagreed with the ALJ's step four finding, concluding plaintiff's past work as a laborer did not  
17 rise to the level of SGA. However, the Appeals Council concluded plaintiff's earnings as a  
18 trim stencil maker were sufficient to meet the SGA threshold, and that plaintiff had the RFC to  
19 perform that job as actually performed.

20 This Court's review of the final decision is limited to whether the decision is in  
21 accordance with the law and the findings supported by substantial evidence in the record as a  
22 whole. *See Penny v. Sullivan*, 2 F.3d 953, 956 (9th Cir. 1993). Substantial evidence means

01 more than a scintilla, but less than a preponderance; it means such relevant evidence as a  
02 reasonable mind might accept as adequate to support a conclusion. *Magallanes v. Bowen*, 881  
03 F.2d 747, 750 (9th Cir. 1989). If there is more than one rational interpretation, one of which  
04 supports the final decision, the Court must uphold that decision. *Thomas v. Barnhart*, 278  
05 F.3d 947, 954 (9th Cir. 2002).

06 Plaintiff argues the ALJ failed to properly evaluate the medical evidence, his testimony,  
07 and the lay evidence, erred at step three and in determining his RFC, and that the Appeals  
08 Council erred by determining his work as a trim stencil maker qualified as past relevant work.  
09 He requests remand for an award of benefits or, in the alternative, for further administrative  
10 proceedings. The Commissioner argues that the decisions of the ALJ and Appeals Council are  
11 supported by substantial evidence and should be affirmed.

#### 12 Medical Opinion Evidence

13 Plaintiff argues the ALJ failed to properly evaluate the opinions of examining  
14 physicians Drs. J. Keith Peterson and Howard Lloyd. As the record contained contradictory  
15 opinion evidence from reviewing physicians/state agency consultants (AR 223-36, 239), the  
16 ALJ was required to provide “‘specific and legitimate reasons’ supported by substantial  
17 evidence in the record” for rejecting the opinions of Drs. Peterson and Lloyd. *Lester v. Chater*,  
18 81 F.3d 821, 830-31 (9th Cir. 1996) (quoted source omitted). It should be noted that the  
19 medical record in this case is extremely limited, consisting almost entirely of the opinions of the  
20 physicians named above and a record from Dr. Nancy Grubb containing a referral to Dr. Lloyd.

#### 21 A. Dr. Peterson

22 Dr. Peterson conducted an examination of plaintiff in July 2009. (AR 211-16.) The

01 ALJ assessed Dr. Peterson's opinions as follows:

02 Consultative examiner Dr. Peterson opined that from a cognitive standpoint, the  
03 claimant was "able to work." He noted that the claimant's pragmatic language  
04 was impaired, the cause of which could be a combination of social anxiety and  
05 cognitive rigidity. He stated that the claimant had no trouble with basic  
06 instructions, his stamina seemed good, and he was an excellent problem solver:  
07 therefore, he should be able to learn simple and quite complex nonverbal  
08 material. Dr. Peterson stated that the prognosis for the claimant's ability to  
09 handle a job was good in a sheltered situation and fair in the open market. Dr.  
10 Peterson's opinion is given weight to the extent that it was based on the mental  
11 status examination findings and results of cognitive testing, which were  
12 consistent with mild limitations. Again, however, I note that Dr. Peterson did  
13 not have accurate information regarding the extent of the claimant's work  
14 activity, therefore, his opinion is not entirely persuasive.

09 (AR 29, internal citation to record omitted.) The ALJ had previously described the  
10 observations, testing results, and findings of Dr. Peterson in detail. (AR 26.) The ALJ also  
11 earlier found that plaintiff's "ongoing and consistent" work activity "seriously undermined" his  
12 allegations of disability:

13 Although the claimant has not engaged in disqualifying [SGA], he has  
14 performed work activity on a consistent basis for the same employer for 15  
15 years. The claimant's work fluctuates because of the nature of the aviation  
16 industry, but he works when he is given the opportunity to do so, sometimes on a  
17 full-time basis.

16 (AR 27.) The ALJ found significant the absence of any evidence the employment involved  
17 special accommodations, that it was sheltered in any way, or that plaintiff's performance was  
18 not acceptable (*id.*), a finding challenged by plaintiff and discussed in detail in relation to step  
19 four.

20 Plaintiff argues the absence of accurate information regarding the extent of his work  
21 activity is not a "legitimate reason to reject Dr. Peterson's opinion about [his] limitations."

22 (Dkt. 15 at 9.) He does not provide any explanation for this assertion. Plaintiff also, in reply

01 to an argument made by the Commissioner, denies the ALJ accounted for all of the limitations  
02 described by Dr. Peterson. He notes the assessed Global Assessment of Functioning (GAF)  
03 score of 47, *see* Diagnostic and Statistical Manual of Mental Disorders 34 (4th ed. 2000)  
04 (DSM-IV-TR) (describing “serious symptoms” or “any serious impairment in social,  
05 occupational, or school functioning.”), testing results reflecting “very poor” short-term and  
06 working memory and “poor” “[r]apid graphomotor responding or perceptual scanning[,]” and  
07 the opinion that plaintiff’s “pragmatic language was impaired[,]” possibly due to “a  
08 combination of social anxiety and cognitive rigidity manifested in interactions with people[,]”  
09 and that although “[h]is language skills improved rather dramatically during our time together,  
10 . . . the latency to respond issue did not disappear.” (AR 216.)

11 Dr. Peterson noted the report that plaintiff “has never been fully employed” and “does  
12 very part-time work for two employers who are both members of the claimant’s church[,]”  
13 consisting of “unskilled ‘pick-up’ tasks”, and that he occasionally mows lawns in his  
14 neighborhood. (AR 211-12.) He clearly considered this report in the summary and  
15 prognosis: “He has almost no work history, and has lived an extremely sheltered life.” (AR  
16 216.) As discussed below, the final decision in this matter does not adequately address the  
17 issue of the accommodations provided to plaintiff in his past work, and the step four decision  
18 lacks the support of substantial evidence. However, even considering those accommodations,  
19 the information provided to Dr. Peterson did not allow for a full or clear picture of plaintiff’s  
20 work history, which, as the ALJ noted, included full-time work, at various times, for a  
21 long-term employer. Given Dr. Peterson’s reliance on the information provided at  
22 examination, it was entirely appropriate for the ALJ to consider that that information was not

01 accurate.

02 Nor does plaintiff otherwise support error in the ALJ's assessment. Dr. Peterson found  
03 plaintiff able to work "[f]rom a cognitive standpoint[,]" acknowledged language-related  
04 impairment without assigning any specific limitation, and stated plaintiff "had no trouble with  
05 basic instructions," had good stamina, "is an excellent problem solver, and should be able to  
06 learn simple and quite complex nonverbal material." (AR 216.) He ultimately opined he  
07 would like to see plaintiff "in a vocational training program tailored to his strengths[,]" and that  
08 the prognosis for handling a job in a sheltered situation was "good" and in the open market was  
09 "fair." (*Id.*) As the Commissioner argues, the ALJ did, in large part, account for the  
10 limitations identified by Dr. Peterson. *See Turner v. Comm'r of Soc. Sec.*, 613 F.3d 1217,  
11 1223 (9th Cir 2010) (ALJ need not provide reason for rejecting physician's opinions where ALJ  
12 incorporated opinions into RFC; ALJ incorporated opinions by assessing RFC limitations  
13 "entirely consistent" with limitations assessed by physician).

14 Further, to the extent he rejected any aspect of the findings or opinions of this physician,  
15 the ALJ provided a specific and legitimate reason for doing so, as discussed above. The ALJ  
16 also relied on the opinions of the Stage agency physicians. (AR 28.) For this reason, and for  
17 the reasons stated above, plaintiff fails to demonstrate error in relation to Dr. Peterson.

18 B. Dr. Lloyd

19 Dr. Lloyd examined plaintiff in June 2010 (AR 245-49), following a referral from Dr.  
20 Grubb. As the ALJ observed, Dr. Grubb "noted that 'one of the main reasons' the claimant  
21 presented to the clinic was to establish care 'so he can move forward with an application for  
22 Social Security disability.'" (AR 26-27.) Dr. Grubb also "noted that the claimant spoke in a



01 slow, deliberate manner; however, there was no evidence of anxiety, depression, or agitation.”  
02 (AR 27 (citing AR 258-59).)

03 The ALJ described and analyzed the evidence from Dr. Lloyd first within the context of  
04 plaintiff’s credibility:

05 Dr. Lloyd[] . . . noted the claimant’s “history of an unspecified developmental  
06 delay.” The claimant described a very limited social network that was  
07 comprised mostly of family members and acquaintances from church. The  
08 claimant denied any problems with concentration and attention, and stated that  
09 he was generally able to complete household chores. However, he reported that  
10 he sometimes had difficulty finding words in conversations and as a result,  
11 people misunderstood him. On mental status examination, the claimant  
12 presented as rather disheveled. He was quiet and reserved and did not maintain  
13 consistent eye contact or initiate conversation. However, Dr. Lloyd stated that  
14 the claimant’s comprehension of questions seemed adequate, and although he  
15 did not have overt word finding difficulties, he needed extra time to formulate  
16 his thoughts into words. Dr. Lloyd stated that the claimant’s recent and remote  
memory seemed fair and his thought processes were linear and coherent. The  
claimant understood and followed direction adequately. Dr. Lloyd  
administered several cognitive testing measures, the results of which indicated  
that the claimant’s overall intellectual functioning was in the average to high  
average range. The claimant’s attention and concentration skills were  
consistently in the average range. Dr. Lloyd stated that the results of the  
evaluation were notable for several areas of cognitive strength including average  
to above average intellectual functioning and reasonably strong visuospatial  
abilities. The claimant’s attention and language skills were consistently in the  
average range, and his memory functioning was average for visual information  
but there was evidence of impairment particularly for single-trial learning.

17 (*Id.*, internal citations to record omitted.) Considering that evidence, and the evidence from

18 Dr. Peterson, the ALJ concluded:

19 The objective findings of record are therefore consistent with some mild  
20 cognitive limitations, but do not support allegations of significant or debilitating  
21 functional limitations. The claimant’s intellectual functioning is average to  
22 above average as evidenced by objective testing, and his concentration and  
attention are intact. While the findings may be consistent with some memory  
impairment, it is not so significant as to cause severe limitations. The records  
are consistent with some limitations in social functioning, which are addressed

01 in the [RFC]. In sum, the psychological evaluations and cognitive testing  
02 measures are not consistent with limitations so severe that they would preclude  
employment.

03 (*Id.*) The ALJ thereafter assessed the opinions of Dr. Lloyd:

04 Examining source Dr. Lloyd opined that the claimant's social anxiety combined  
05 with the neurocognitive difficulties would result in "some fairly substantial  
06 functional limitations," particularly in social settings. He stated that while the  
07 claimant had the basic intellectual capability to perform adequately in a work  
08 setting, he lacked "the necessary social skills and executive functioning capacity  
09 to function in a competitive work environment." Dr. Lloyd stated that the  
10 "limited" work experience the claimant had involved fairly repetitive tasks that  
11 he performed essentially in isolation. He opined that interacting with  
12 coworkers or the public would be "extraordinarily difficult" for the claimant,  
13 and also opined that the claimant's performance speed would render him unable  
14 to maintain the pace needed to perform at acceptable levels. Dr. Lloyd's  
15 opinion is not persuasive or given significant weight for several reasons. First,  
16 it is significant that testing contained in Dr. Lloyd's report showed overall  
17 normal functioning, including a full scale IQ score of 103, which does not  
18 support the cognitive limitations assessed. Second, as noted above, the  
19 claimant does not have "limited" employment history; rather, he has a  
20 documented history of working for the same employer for 15 years, during some  
of which he earned significant amounts. In addition, there is no evidence from  
the claimant's long-term employer to establish that the claimant's work is a  
special accommodation or that he has not performed the work satisfactorily. It  
also appears that Dr. Lloyd did not adequately consider the extent of the  
claimant's activities. He stated that the claimant "struggled to identify areas of  
interest" beyond watching television, playing computer games, and flying kites;  
however, as discussed above, the claimant has described many activities  
showing that his interest and involvement are well within normal ranges,  
including but not limited to his competitive kite flying, socializing at church  
activities and meetings, performing household chores, driving, banking, and  
shopping. Finally, the record shows that the claimant is capable of some  
appropriate social interactions, as evidenced by his ability to attend church  
meetings and activities, events related to his kite flying, and his longstanding  
employment. For all these reasons, Dr. Lloyd's opinion is not sufficiently  
supported or consistent with the record and is therefore not given significant  
weight.

21 (AR 29, internal citations to record omitted.)

22 Plaintiff argues the ALJ is not qualified to reject Dr. Lloyd's opinion based on the ALJ's

01 belief that the opinion is contradicted by the IQ test results. However, in fact, “[t]he ALJ is  
02 responsible for resolving conflicts in the medical record.” *Carmickle v. Comm’r of SSA*, 533  
03 F.3d 1155, 1164 (9th Cir. 2008) (citing *Benton v. Barnhart*, 331 F.3d 1030, 1040 (9th Cir.  
04 2003)). *Accord Thomas*, 278 F.3d at 956-57 (“When there is conflicting medical evidence, the  
05 Secretary must determine credibility and resolve the conflict.”) (quoting *Matney v. Sullivan*,  
06 981 F.2d 1016, 1019 (9th Cir. 1992)). When evidence reasonably supports either confirming  
07 or reversing the ALJ’s decision, we may not substitute our judgment for that of the ALJ,  
08 *Tackett v. Apfel*, 180 F.3d 1094, 1098 (9th Cir. 1999).

09 In this case, the ALJ appropriately relied on the internal inconsistency between Dr.  
10 Lloyd’s findings on examination and his opinion, as well as on the contradictory opinion  
11 evidence from Dr. Peterson and the reviewing physicians. *See Bayliss v. Barnhart*, 427 F.3d  
12 1211, 1216 (9th Cir. 2005) (rejecting physician’s opinion due to discrepancy or contradiction  
13 between opinion and the physician’s own notes or observations is “a permissible determination  
14 within the ALJ’s province.”); *Morgan v. Commissioner of the SSA*, 169 F.3d 595, 603 (9th Cir.  
15 1999) (ALJ appropriately considers internal inconsistencies within and between physicians’  
16 reports). The ALJ’s interpretation of the evidence can be deemed reasonable.

17 Plaintiff also offers cursory arguments that his limited activities do not justify the  
18 rejection of Dr. Lloyd’s opinions, and that his ability to engage in some social interactions is not  
19 a convincing or even legitimate reason to reject the opinions of a physician who based his  
20 opinions on extensive neuropsychological testing. These arguments fail. An ALJ properly  
21 considers inconsistency with the record in rejecting a physician’s opinions. *Tommasetti v.*  
22 *Astrue*, 533 F.3d 1035, 1041 (9th Cir. 2008). In this case, the ALJ appropriately reasoned that

01 the record contained evidence that plaintiff engaged in more extensive activities and social  
02 interactions than that considered by Dr. Lloyd. The ALJ also properly considered the  
03 contradictory medical evidence in the record.<sup>3</sup>

04 Plaintiff does, however, raise a legitimate criticism as to the ALJ's rejection of Dr.  
05 Lloyd's opinion based on that physician's understanding of plaintiff's employment history.  
06 Again, plaintiff establishes that the Appeals Council erred in the assessment at step four, and, in  
07 particular, the conclusion that plaintiff did not receive special accommodations in his past  
08 work. Unlike Dr. Peterson, Dr. Lloyd appears to have had a fairly accurate understanding as to  
09 the details surrounding plaintiff's past work. (*See* AR 246, 248-49 ("Mr. Hilliard has worked  
10 on a part-time basis for a company owned by a member of the church he attends. He is  
11 apparently called in to work on an as-needed basis when they have work available for him.  
12 This involves cutting patterns from heavy-duty paper for wood products that are manufactured  
13 by this company. Mr. Hilliard earned less than \$10,000 in the last year from this work.  
14 Fortunately, his employer has maintained him on the company health insurance policy."; "The  
15 limited work experience he has involves fairly repetitive tasks that he performs essentially in  
16 isolation. He is not required to interact with coworkers or with the general public[.]"; "He has  
17 been very fortunate in having an employer who has been willing to support him on the  
18 company's medical coverage despite the fact that Mr. Hilliard works on a part-time basis. It is  
19 also important to note that Mr. Hilliard was not required to apply for or interview for his job.

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21 <sup>3</sup> Plaintiff, in reply, challenges arguments raised by the Commissioner supporting the ALJ's  
22 assessment of Dr. Lloyd's opinions. (*See* Dkt. 17.) However, the Commissioner's arguments were in  
large part not responsive to the arguments raised by plaintiff and addressed above. (*See* Dkt. 16.)  
Moreover, none of the arguments undermine the substantial evidence support for the ALJ's decision to  
not assign significant weight to the opinions of Dr. Lloyd.

01 Given his extreme social discomfort the act of applying and interviewing for a job would pose a  
02 virtually insurmountable barrier to employment for Mr. Hilliard.”)) The ALJ was not privy to  
03 the information provided by plaintiff’s employer and setting forth the special accommodations  
04 provided in plaintiff’s past work. (AR 134.) This evidence undercuts the rejection of Dr.  
05 Lloyd’s opinions based, in part, on the absence of evidence plaintiff was provided special  
06 accommodations in his work.

07 The ALJ did, as discussed above, set forth specific and legitimate reasons for rejecting  
08 Dr. Lloyd’s opinions. Given those other reasons, it could be argued the error as related to  
09 plaintiff’s past work was harmless. *See Molina v. Astrue*, 674 F.3d 1104, 1115 (9th Cir. 2012)  
10 (ALJ’s error may be deemed harmless where it is “inconsequential to the ultimate  
11 nondisability determination.”; court looks to “the record as a whole to determine whether the  
12 error alters the outcome of the case.”) (cited sources omitted). However, because this case  
13 should be remanded in relation to plaintiff’s past work, the ALJ should take the opportunity on  
14 remand to consider the impact, if any, of the evidence from plaintiff’s employer as related to the  
15 opinions of Dr. Lloyd.

#### 16 Credibility

17 Absent evidence of malingering, an ALJ must provide clear and convincing reasons to  
18 reject a claimant’s testimony. *Lingenfelter v. Astrue*, 504 F.3d 1028, 1036 (9th Cir. 2007)  
19 (quoting *Bunnell v. Sullivan*, 947 F.2d 341, 344 (9th Cir. 1991)). *See also Vertigan v. Halter*,  
20 260 F.3d 1044, 1049 (9th Cir. 2001). “General findings are insufficient; rather, the ALJ must  
21 identify what testimony is not credible and what evidence undermines the claimant’s  
22 complaints.” *Lester*, 81 F.3d at 834. “In weighing a claimant’s credibility, the ALJ may

01 consider his reputation for truthfulness, inconsistencies either in his testimony or between his  
02 testimony and his conduct, his daily activities, his work record, and testimony from physicians  
03 and third parties concerning the nature, severity, and effect of the symptoms of which he  
04 complains.” *Light v. Social Sec. Admin.*, 119 F.3d 789, 792 (9th Cir. 1997).

05 The ALJ in this case found plaintiff’s impairments could be reasonably expected to  
06 cause some of the alleged symptoms, but that his statements concerning the intensity,  
07 persistence, and limiting effects of those symptoms were not credible to the extent inconsistent  
08 with the assessed RFC. Plaintiff challenges the reasons offered by the ALJ in support of that  
09 conclusion.

10 A. Objective Evidence

11 The ALJ concluded the objective findings in the record failed to provide “strong  
12 support” for the extent of the symptoms and limitations alleged, and were more consistent with  
13 the assessed RFC. (AR 26.) As reflected above, the ALJ discussed the objective medical  
14 findings in detail, and concluded the findings supported some degree of limitation, but not “so  
15 severe that they would preclude employment.” (AR 26-27.)

16 Plaintiff incorrectly argues this reasoning constituted the improper application of the  
17 “objective evidence test.” (Dkts. 15 & 17.) “While subjective pain testimony cannot be  
18 rejected on the sole ground that it is not fully corroborated by objective medical evidence, the  
19 medical evidence is still a relevant factor in determining the severity of the claimant’s pain and  
20 its disabling effects.” *Rollins v. Massanari*, 261 F.3d 853, 857 (9th Cir. 2001); Social Security  
21 Ruling (SSR) 96-7p. The ALJ did not find plaintiff less than fully credible based solely on the  
22 lack of objective support. Instead, the ALJ offered a number of reasons to support his

01 conclusion.

02 Plaintiff also contends that this portion of the ALJ's credibility assessment was tainted  
03 by the failure to properly evaluate the medical opinion evidence. As discussed above, with the  
04 exception of partial error in relation to Dr. Lloyd, the ALJ properly assessed the medical  
05 evidence. The partial error does not alter the ALJ's conclusion that the objective evidence  
06 does not support the degree of limitation alleged.

07 B. Treatment

08 The ALJ noted plaintiff "has received no treatment for his allegedly disabling  
09 conditions, and was only recently evaluated in connection with his claim for disability  
10 benefits." (AR 26.) Plaintiff avers error in the ALJ's failure to acknowledge the absence of  
11 any cure for developmental disorders, and points to Dr. Lloyd's observation that, although  
12 plaintiff may benefit from social skills based training, "even with such intervention, it is  
13 doubtful" he "would be able to acquire the full range of skills needed to successfully engage in  
14 a job search and maintain employment in a competitive work setting." (AR 249.) In his  
15 reply, plaintiff states that there is no treatment available to him. (Dkt. 17 at 4-6.)

16 Plaintiff's arguments lack merit. An ALJ appropriately considers an unexplained or  
17 inadequately explained failure to seek treatment or follow a prescribed course of treatment.  
18 *Tommasetti*, 533 F.3d at 1039; *Burch v. Barnhart*, 400 F.3d 676, 781 (9th Cir. 2005).

19 Plaintiff improperly equates the absence of a "cure" for developmental disorders with  
20 the absence of any treatment. The mere fact a condition may not be reversed does not mean  
21 any and all symptoms of that condition may not be reduced or mitigated to some degree.  
22 Indeed, as plaintiff recognizes, although Dr. Lloyd found the complete success of intervention

01 “doubtful,” he identified specific treatment options, such as basic social skills training and a  
02 structured cognitive-behavioral oriented treatment program, involving “a combination of  
03 individual therapy, group interaction[,] treatment[,]” and “[t]raining in basic social  
04 pragmatics[.]” (AR 249.) Also, Dr. Peterson stated he “would like to see this claimant in a  
05 vocational training program tailored to his strengths.” (AR 216.)

06 Plaintiff’s argument is further undercut by the focus on only one of his conditions. He  
07 does not suggest, nor can it be said that there is an absence of any treatment available for social  
08 anxiety disorder and features of schizoid and avoidant personality disorder. Dr. Lloyd, in fact,  
09 opined that plaintiff would benefit from treatment for his anxiety. (AR 249.) Plaintiff sets  
10 forth no explanation for the failure to seek treatment, and does not establish error in the ALJ’s  
11 consideration of this factor.

12 C. Work Activity

13 The ALJ next found plaintiff’s work activity to serve as a basis for undermining his  
14 credibility. The ALJ noted the fluctuating and sometimes full-time work plaintiff performed  
15 for the same employer, for a number of years. (AR 27.) He further stated:

16 It is significant that there is no evidence whatsoever that the claimant’s  
17 employment involves any special accommodations, is sheltered in any way, or  
18 that the claimant’s performance is not acceptable. The claimant’s ongoing and  
consistent work activity seriously undermines his allegation of disability.

19 (*Id.*)

20 Plaintiff asserts that, for the past fifteen years, he has been working for a family friend,  
21 who created for him “essentially a sheltered workshop type of job[.]” (Dkt. 15 at 13.) He  
22 points to his testimony, the testimony of his sister, and the statement from his employer, Pat



01 Orrino, as providing evidence of the special accommodations provided in his work. (*See* AR  
02 46-47, 55-56, and 134.) He denies that his work activity serves as a clear and convincing  
03 reason to reject his testimony, and maintains his sporadic ability to perform this accommodated  
04 work was fully consistent with that testimony.

05 An ALJ properly considers a claimant's work history in evaluating credibility. *Smolen*  
06 *v. Chater*, 80 F.3d 1273, 1284 (9th Cir. 1996). *See also Gregory v. Bowen*, 844 F.2d 664,  
07 666-67 (9th Cir. 1988) ("Furthermore, substantial evidence indicated that the condition of  
08 Gregory's back had remained constant for a number of years and that her back problems had  
09 not prevented her from working over that time.") Plaintiff testified he had been performing the  
10 work at issue, part-time, for several years leading up to the 2011 hearing, some weeks having no  
11 hours and other weeks working "up to as many as 35 to 40[]" hours. (AR 41, 43.) He had, the  
12 week prior to the hearing, worked for thirty or so hours. (AR 43.)

13 Given plaintiff's testimony and other evidence in the record, the ALJ reasonably  
14 considered evidence of plaintiff's work activity as detracting from his credibility as to the  
15 degree of his symptoms and their impact on his ability to work. The reasonableness of the  
16 ALJ's consideration of plaintiff's work as a general matter and the other clear and convincing  
17 reasons provided for rejecting plaintiff's credibility could be said to support the conclusion that  
18 the ALJ's statement as to a lack of accommodations constituted harmless error. *See Molina*,  
19 674 F.3d at 1115.

20 However, as discussed in detail below, the Court agrees with plaintiff that the letter  
21 from Mr. Orrino supports the conclusion that plaintiff received special accommodations which  
22 allowed him to perform his work. As this matter should be remanded for further consideration

01 given the error at step four, the ALJ should also take the opportunity to consider whether the  
02 letter from Mr. Orrino impacts the assessment of plaintiff's credibility.

03 D. Inconsistent Statements

04 The ALJ also found inconsistencies relating to plaintiff's work activity to detract from  
05 his credibility. (AR 28.) He contrasted plaintiff's statements to Dr. Peterson with the  
06 evidence in the record. He also noted plaintiff's report to Dr. Grubb that he "has never been  
07 able to hold a steady job" and Dr. Lloyd's observation that he worked only "on a part-time  
08 basis." (*Id.* (citing AR 256 and 249).) The ALJ found these statements "completely  
09 contradicted by the claimant's earnings record, which show that he has worked consistently for  
10 the same employer for at least 15 years, some of which he earned significant amounts consistent  
11 with substantial gainful activity[.]" (*Id.* (citing AR 125-31).)

12 Plaintiff avers that neither the fact that Dr. Peterson did not fully understand his past  
13 work activity, nor Dr. Lloyd's accurate observation that he worked part-time serves as a  
14 convincing reason to reject his testimony. However, while the reliance on Dr. Lloyd's  
15 comment is questionable, the ALJ appropriately noted inconsistency between the information  
16 provided to Drs. Peterson and Grubb and the evidence in the record as to the extent of plaintiff's  
17 work activity. In particular, Dr. Peterson's statement that plaintiff "has almost no work  
18 history[]" (AR 216) and Dr. Grubb's observation that plaintiff has been unable "to hold a steady  
19 job[]" supports the ALJ's conclusion as to inconsistency between plaintiff's reporting and the  
20 record. The ALJ, therefore, properly considered this factor in relation to plaintiff's credibility.  
21 *See Tonapetyan v. Halter*, 242 F.3d 1144, 1148 (9th Cir. 2001) (ALJ appropriately considers  
22 inconsistency with the evidence) and SSR 96-7p ("One strong indication of the credibility of an

individual's statements is their consistency, both internally and with other information in the case record.") The ALJ need only reconsider this issue if necessitated by consideration of the evidence from Mr. Orrino.

E. Activities of Daily Living

The ALJ also relied on evidence of plaintiff's activities:

Finally, I note that although the claimant alleges symptoms and limitations so severe that they render him debilitated, the record documents significant activities that suggest greater functioning and that undermine the claimant's allegations. The claimant has had the privilege of living at home all of his life and has had all household services and benefits provided by his family. Nonetheless, function reports contained in the record show that the claimant is able to perform activities including preparing simple meals on a daily basis, shopping, doing household chores and yard work, driving without restriction, visiting his mother, and attending church. The claimant enjoys activities including reading, watching television, playing video games, playing golf, music and playing piano, and attends church. In addition, the claimant testified that he belongs to the American Kite Flyer Association and has traveled on his own to places including Oregon, California, and the Washington coast for competitions and meeting[s] related to his kite flying; he told Dr. Peterson that he recently won a kite flying contest. The claimant has reported traveling alone and camping. Although the ability to travel and disability are not mutually exclusive, the fact that the claimant is able to independently prepare for and make trips on his own suggests capabilities that are consistent with work-related abilities. It is also significant that although allegations have been made regarding the claimant's social difficulties, activities in the record suggests that those limitations are not as severe as alleged. For example, in a Function Report he completed, the claimant reported socializing with others at church and paying golf with friends. The claimant also reported that he has no trouble getting along with authority figures. The claimant's documented activities, when considered in light of the rest of the record, establishes greater functioning than alleged and supports the residual functional capacity set forth above.

(AR 28, internal citations to record omitted.)

Plaintiff contests the ALJ's statement that he claimed to be "debilitated[.]" and describes the ALJ's statement as to the "privilege" of living at home with services and benefits

01 provided to him as “an egregious and insulting mischaracterization” of his situation. (Dkt. 15  
02 at 14 and AR 28.) He states that, more accurately, he lived with his parents his whole life  
03 because he was unable to live on his own due to his developmental disorder, and contends this  
04 statement calls into question the ALJ’s ability to fairly adjudicate this matter if remanded for  
05 another hearing. Plaintiff otherwise challenges the ALJ’s assertion that his activities are  
06 inconsistent with his testimony. He notes, for example, that he has attended only two  
07 kite-flying conventions, that he socializes only with fellow church members, and points to his  
08 testimony as to his difficulty in holding conversations with people. (See AR 47-51.)

09       However, an ALJ appropriately considers inconsistencies or contradictions between a  
10 claimant’s statements and activities of daily living. *Tonapetyan*, 242 F.3d at 1148; *Thomas*,  
11 278 F.3d at 958-59. *See also Molina*, 674 F.3d at 1112-13 (“While a claimant need not  
12 “vegetate in a dark room” in order to be eligible for benefits, the ALJ may discredit a  
13 claimant’s testimony when the claimant reports participation in everyday activities indicating  
14 capacities that are transferable to a work setting. Even where those activities suggest some  
15 difficulty functioning, they may be grounds for discrediting the claimant’s testimony to the  
16 extent that they contradict claims of a totally debilitating impairment.”) (citations omitted).  
17 Here, the ALJ properly considered the inconsistency between plaintiff’s testimony as to the  
18 degree of his limitation and the extent of his activities.

19       Nor does plaintiff demonstrate bias on the part of the ALJ. An ALJ is presumed to be  
20 unbiased and such presumption can only be rebutted “by a showing of conflict of interest or  
21 some other specific reason for disqualification.” *Valentine v. Comm’r SSA*, 574 F.3d 685,690  
22 (9th Cir. 2009) (quoting *Rollins*, 261 F.3d at 857). In this case, the ALJ’s use of the terms

01 “debilitated” and “privilege” does not suffice to demonstrate his inability to fairly adjudicate  
02 plaintiff’s claim. Instead, these terms can be deemed less than ideal word choices to support  
03 otherwise reasonable observations. For example, substitution of the term “fortune” for  
04 “privilege” in the ALJ’s statement would have been an entirely accurate and appropriate  
05 observation on the part of the ALJ. There is, therefore, no basis for assignment to a different  
06 ALJ on remand.

07 Lay Witness Evidence

08 Lay witness testimony as to a claimant’s symptoms or how an impairment affects ability  
09 to work is competent evidence and cannot be disregarded without comment. *Van Nguyen v.*  
10 *Chater*, 100 F.3d 1462, 1467 (9th Cir. 1996). The ALJ can reject the testimony of lay  
11 witnesses only upon giving germane reasons. *Smolen*, 80 F.3d at 1288-89 (finding rejection of  
12 testimony of family members because, *inter alia*, they were “understandably advocates, and  
13 biased”) amounted to “wholesale dismissal of the testimony of all the witnesses as a group and  
14 therefore [did] not qualify as a reason germane to each individual who testified.”) (citing  
15 *Dodrill v. Shalala*, 12 F.3d 915, 918 (9th Cir. 1993)).

16 Plaintiff avers error in the ALJ’s consideration of the lay witness evidence from his  
17 sister and brother:

18 In addition to her testimony at the hearing, I have considered a statement written  
19 by the claimant’s sister in August 2009 in which she stated that the claimant  
20 needed direction with many tasks and had never been employed full-time. She  
21 stated that the claimant never engaged in conversation on his own and took a  
22 long time to answer questions. The claimant’s brother completed a Third Party  
Function Report in May 2009 in which he stated that the claimant sometimes  
needed reminders to attend to personal care tasks or perform chores. The  
claimant’s brother stated that the claimant had slow responses in conversation  
and trouble understanding and following some verbal instruction. He stated

01 that the claimant sometimes did not complete tasks on time or at all, and  
02 sometimes lacked concentration when doing assigned tasks. The claimant's  
03 brother stated that the claimant had problems handling stressful situations and  
04 became frustrated easily under stress or with changes in routine. He stated that  
05 the claimant was very introverted, had few friends, and preferred to be alone  
06 most of the time. The testimony and statements of the claimant's siblings  
07 have been considered and are generally corroborative of the claimant's  
08 allegations, and I find the lay witnesses generally credible. However, the  
09 testimony and statements also generally describe an individual who is capable of  
10 the [RFC] set forth above, and their opinions and observations are not consistent  
11 with a finding of disability, i.e. a complete inability to work. The objective  
12 findings and the claimant's activities, including his work, support greater  
13 functioning than alleged.

14 (AR 29-30 (internal citations to AR 191 and AR 179-87).)

15 Plaintiff describes the testimony of the lay witnesses in detail and contends that the  
16 testimony, credited as true, shows he is more limited than found by the ALJ. However,  
17 plaintiff fails to set forth any basis for crediting the lay witness testimony as true. The ALJ  
18 gave some credit to the testimony proffered by these witnesses, and the RFC accounts for some  
19 of the limitations attested to, including limitations in plaintiff's interactions with others. The  
20 ALJ also provided germane reasons for not entirely accepting the lay testimony, appropriately  
21 pointing to the objective findings and plaintiff's activities as supporting plaintiff's greater  
22 ability. *See, e.g., Bayliss v. Barnhart*, 427 F.3d 1211, 1218 (9th Cir. 2005) ("The ALJ  
accepted the testimony of Bayliss's family and friends that was consistent with the record of  
Bayliss's activities and the objective evidence in the record; he rejected portions of their  
testimony that did not meet this standard."); *Lewis v. Apfel*, 236 F.3d 503, 512 (9th Cir. 2001)  
(contradictory medical records supported ALJ's rejection of lay testimony as to symptoms).  
Given the provision of this germane reasoning, the ALJ's assessment has the support of

01 substantial evidence.<sup>4</sup> The ALJ need not reconsider the lay testimony except as necessitated  
02 by consideration of the evidence from Mr. Orrino.

03 Step Three

04 Plaintiff argues the ALJ erred in concluding his impairments did not meet or equal a  
05 listing. He maintains the medical evidence from Dr. Lloyd and Dr. Peterson, along with his  
06 testimony and the lay evidence, support the conclusion that he meets or equals Listing 12.10,  
07 governing autistic disorder and other pervasive developmental disorders. That is, the evidence  
08 shows he has qualitative deficits in reciprocal social interaction and in verbal and nonverbal  
09 communication, and marked restrictions in at least two of the following areas: activities of daily  
10 living; maintaining social functioning; maintaining concentration, persistence, or pace; or  
11 repeated episodes of decompensation each of extended duration. 20 C.F.R. Pt. 404, Subpt. P,  
12 App. 1, § 12.10.

13 Plaintiff bears the burden of proving the existence of impairments meeting or equaling a  
14 listing. *Burch*, 400 F.3d at 683. Plaintiff does not identify medical opinion or other evidence  
15 establishing he met the specific requirements of Listing 12.10. As discussed above, the ALJ  
16 provided specific and legitimate reasons for rejecting some opinion evidence, and properly  
17 relied on contradictory evidence in the record. While plaintiff points generally to evidence in  
18 the record he maintains supports a step three finding, he fails to offer any “theory, plausible or  
19 otherwise, as to” how his impairment met a listing. *Lewis*, 236 F.3d at 514. Accordingly,  
20 plaintiff’s step three argument should be denied.

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21  
22 <sup>4</sup> In reaching this conclusion, the Court declines to address the Commissioner’s argument and  
plaintiff’s response on the question of whether the ALJ fully accommodated the lay witness testimony in  
the RFC. (See Dkt. 16 at 11 and Dkt. 17 at 8.)

RFC

Plaintiff avers that the ALJ improperly determined his RFC, pointing to the ALJ's failure to include all of the limitations described by Drs. Lloyd and Peterson, as well as limitations described in his testimony and by lay witnesses. However, with the limited exception of the consideration of past work, plaintiff fails to demonstrate error in the consideration of the medical opinions, plaintiff's credibility, or the lay testimony. The mere restating of plaintiff's arguments fails to establish error in the assessment of plaintiff's RFC. *See Stubbs-Danielson v. Astrue*, 539 F.3d 1169, 1175-76 (9th Cir. 2008). Again, the ALJ need only reconsider plaintiff's RFC as necessitated by consideration of the evidence from Mr. Orrino.

Past Relevant Work Finding at Step Four

Plaintiff argues error in the decision of the Appeals Council at step four. The Appeals Council concluded plaintiff's earnings in his position as a trim stencil maker rose to the level of SGA in at least six different years since 1996. (AR 5.) The decision further stated:

[T]he Council notes that a letter from this employer did not reference the need for any accommodations to perform this job, although it did indicate that the claimant encountered difficulties when asked to perform additional tasks. Therefore, the Council finds that the [RFC] would enable the claimant to perform the job of trim stencil maker as he actually performed it.

(*Id.*)

Plaintiff bears the burden of showing he does not have the capacity to engage in past relevant work. Past relevant work is work (1) performed within the past fifteen years, (2) constituting SGA, and (3) lasting long enough for the individual to have learned how to perform the work. 20 C.F.R. §§ 404.1560(b)(1), 404.1565(a), 416.960(b)(1), 416.965(a).



01 SGA “is work done for pay or profit that involves significant mental or physical  
02 activities.” *Lewis*, 236 F.3d at 515 (citing 20 C.F.R. §§ 404.1571-404.1572 &  
03 416.971-416.975). Earnings are a presumptive, not a conclusive sign of whether a job  
04 constitutes SGA. *Id.* Factors relevant to the consideration of work activity include “the  
05 nature of the claimant’s work, how well the claimant does the work, if the work is done under  
06 special conditions, if the claimant is selfemployed [sic], and the amount of time the claimant  
07 spends at work.” *Id.* (citing 20 C.F.R. §§ 404.1573, 416.973).

08 Plaintiff avers his work as a trim stencil maker does not constitute past relevant work  
09 because it was performed under special conditions. Work performed under special conditions,  
10 such as work in a sheltered workshop or as a patient in a hospital, may be found to not constitute  
11 SGA. 20 C.F.R. § 404.1573(c). Examples of special conditions include: (1) the  
12 requirement and receipt of special assistance from other employees in performing work; (2) the  
13 allowance to work irregular hours or take frequent rest periods; (3) the provision of special  
14 equipment or assignment to work especially suited to an individual’s impairment; (4) the ability  
15 to work only due to specially arranged circumstances, such as other people helping you prepare  
16 for or get to and from work; (5) permission to work at a lower standard of productivity or  
17 efficiency than other employees; or (6) the fact that you were given the opportunity to work  
18 despite your impairment because of family relationship, past association with your employer, or  
19 your employer’s concern over your welfare. *Id.*

20 Plaintiff argues his past work meets all but the fourth above-described criteria.  
21 Plaintiff testified he got the job through a member of his congregation, that he believed his  
22 employer continued to provide him with medical insurance even when he was not working, that

01 he was not required to interview for the position, and that he worked at his own pace, which he  
02 believed was slower than average. (AR 46-47.) He further points to the letter from his  
03 employer, submitted to the Appeals Council, as demonstrating he was provided with special  
04 conditions to perform his job. (AR 134.) For the reasons described below, the Court agrees  
05 with plaintiff.

06       The Appeals Council found that the letter from Mr. Orrino did not reference the need for  
07 any accommodations, while conceding it indicated plaintiff encountered difficulties when  
08 asked to perform additional tasks. (AR 5.) This was not a fair reading of the letter.

09       Mr. Orrino, of Woodland Trade Company, Inc, described plaintiff as a “reliable and  
10 trustworthy employee[.]” since September 1990, adding that, “[w]hile he has some outstanding  
11 qualities to offer an employer, he also has limitations.” (AR 134.) It was not possible to give  
12 plaintiff “various tasks throughout the day[.]” as it was difficult for him to “grasp new styles or  
13 approaches on assignments” and he was “not multi-task oriented.” (*Id.* (“He gets very  
14 frustrated and anxious if queried to work on several projects at the same time.”)) Also, due to  
15 “safety concerns[.]” the company “restricted his use of motorized electrical equipment[.]”  
16 (*Id.*) However, because he has been “such a dedicated and dependable worker” it was  
17 “possible for him to be employed and to work on one specific job . . . routinely perform[ed] for  
18 a customer.” (*Id.*) The job was repetitive and required only minimal use of hand tools.  
19 While it allowed for plaintiff’s employment quite frequently in the past, it had of late been  
20 infrequently available. Mr. Orrino “certainly could not say that [plaintiff] is considered an  
21 employable individual who can handle work related skills that require multi-tasking.” (*Id.*)  
22 He found “it difficult to believe [plaintiff] could be gainfully employed due to his cognitive

01 restrictions at any company[.]” and stated plaintiff had been employed with his company due to  
02 their “long standing history”, but “with limited duties.” (*Id.*)

03       The letter from Mr. Orrino supports the conclusion that plaintiff required specific  
04 accommodations to perform the job. In fact, it appears plain plaintiff was assigned to work  
05 “especially suited” to his impairment, and that he was able to work “only due to specially  
06 arranged circumstances[.]” § 404.1573(c)(3)-(4). It further appears likely he was permitted  
07 to work at a lower standard of productivity or efficiency than other employees, given that,  
08 unlike those employees, he was unable to perform a variety of tasks throughout the day. §  
09 404.1573(c)(5). Also, the letter from Mr. Orrino, taken together with the testimony of both  
10 plaintiff and his sister, supports the conclusion that plaintiff was given the opportunity to work  
11 because of concern as to his welfare. § 404.1573(c)(6). (*See* AR 55 (plaintiff’s sister testified  
12 as to her belief the work was provided “as a favor,” given that the company “know the  
13 circumstances and they’ve kind of taken him under his, their wing and taught him, you know, a  
14 specific job that he can handle.”))

15       The Commissioner asserts that Mr. Orrino indicated plaintiff’s irregular hours were due  
16 to changes in the industry, rather than any accommodations provided, and that he did not  
17 indicate plaintiff was permitted to work at a lower productivity standard than other employees.  
18 This reasoning ignores the evidence that the job itself appears to have been created as an  
19 accommodation for plaintiff. The assertion as to an absence of evidence plaintiff was provided  
20 special equipment ignores the fact that, as an accommodation, he was excluded from work  
21 requiring the use of motorized equipment, and that he appears to have been “assigned work  
22 especially suited to [his] impairment.” § 404.1573(c)(3). Finally, that plaintiff got the job

01 through a member of his congregation does not exclude the conclusion he was employed based  
02 on a concern for his welfare. In fact, the church association, considered together with the  
03 language and tone of Mr. Orrino's letter and the testimony of plaintiff and his sister, further  
04 bolsters the conclusion that plaintiff was provided the work out of concern for his welfare.

05 In sum, the Appeals Council's interpretation of the evidence from Mr. Orrino, along  
06 with the remainder of the evidence on this particular issue, was not reasonable. Instead, the  
07 evidence from Mr. Orrino demonstrates the lack of substantial evidence support for the  
08 conclusion that plaintiff's work as a trim stencil maker constitutes SGA and, therefore, past  
09 relevant work at step four.

#### 10 Remand

11 The Court has discretion to remand for further proceedings or to award benefits. *See*  
12 *Marcia v. Sullivan*, 900 F.2d 172, 176 (9th Cir. 1990). The Court may direct an award of  
13 benefits where "the record has been fully developed and further administrative proceedings  
14 would serve no useful purpose." *McCartey v. Massanari*, 298 F.3d 1072, 1076 (9th Cir.  
15 2002).

16 Such a circumstance arises when: (1) the ALJ has failed to provide legally  
17 sufficient reasons for rejecting the claimant's evidence; (2) there are no  
18 outstanding issues that must be resolved before a determination of disability can  
19 be made; and (3) it is clear from the record that the ALJ would be required to  
20 find the claimant disabled if he considered the claimant's evidence.

19 *Id.* at 1076-77.

20 Plaintiff notes the vocational expert's testimony that the addition of a limitation to the  
21 RFC and hypothetical allowing plaintiff to work at his own pace would preclude a finding that  
22 plaintiff could perform past or any other work in the national economy. (AR 60-61.) Based

01 on this and other errors, including medical opinion testimony which plaintiff posits should be  
02 credited as true, plaintiff argues this matter should be remanded for an award of benefits. (*See*,  
03 *e.g.*, AR 62 (VE testimony responding to hypothetical including various factors contained in  
04 medical evidence).)

05 The Court disagrees. The ALJ did not include any limitation related to pace or other  
06 limitations urged by plaintiff, and plaintiff fails to set forth reversible error in all but the  
07 consideration of the lay statement from Mr. Orrino. This matter should be remanded and the  
08 ALJ directed to consider the lay statement from Mr. Orrino at step four, and to further consider  
09 whether, at step five, other work exists in significant numbers in the national economy plaintiff  
10 could perform.

11 **CONCLUSION**

12 For the reasons set forth above, this matter should be REMANDED for further  
13 administrative proceedings.

14 DATED this 22nd day of July, 2013.

15  
16 

17 Mary Alice Theiler  
18 United States Magistrate Judge  
19  
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21  
22